Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MIGUEL A. ASCARRUNZ --- PETITIONER

VS.

BECHTEL POWER CORPORATION --- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT NORTHERN CALIFORNIA (SAN FRANCISCO)

PETITION FOR WRIT OF CERTIORARI

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71 pp

QUESTIONS PRESENTED FOR REVIEW

The Appeals Court dismissed the case for lack of jurisdiction-untimely filing of the Notice of Appeal.

Whether good cause exists to consider otherwise untimely notice of appeal and to examine prevailing delay to see if there is something akin to "excusable neglect" or "good cause" that excuses delay.

Whether petitioner's rights were violated when evidence presented to the District Court was disregarded when respondent's motion for summary judgement was granted just a day ahead of the PRE-TRIAL CONFERENCE OR EVIDENTIARY HEARING.

Whether respondent's failure to give notice of downsizing or reduction in personnel to employees in accordance to the "Worker Adjustment and Retraining Notification or the "WARN Act" 20 C.F.R 639 was legal.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A and Appendix D to the petition and is unpublished

The opinion of the United States District Court appears at Appendix B and Appendix C to the petition and is unpublished

JURISDICTION

The date on which the United States Court of Appeals decided my case was December 18, 1997.

A timely petition for rehearing was mailed on December 22, 1997, denied by the United States Court of Appeals on the following date: February 10, 1998 and a copy of the order denying rehearing appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This is a Civil Case:

The applicable statutory is:

29 U.S.C. § 621, et seq.
The Age Discrimination In Employment Act ("ADEA").

The "Warn Act" 20 CFR 639.

STATEMENT OF THE CASE

Petitioner, Miguel A. Ascarrunz, affirms that his employment was involuntarily terminated by the respondent on April 2, 1993 based on his age. At the time of the layoff, petitioner worked 26 years for the respondent and held the classification of a Grade 26, Electrical Design Supervisor.
Respondent, Bechtel Power Corporation, with its headquarters based in San Francisco, California employed Miguel A. Ascarrunz, from June 14, 1967 until April 23, 1993 as a designer of electrical systems.
Petitioner filed a complaint with the EEOC on March 15, 1994 and received his notice of "Right to Sue", based on the Age Discrimination in Employment Act ("ADEA"), on November 24, 1995.
Petitioner filed the complaint to this action to the United States District Court for the Northern District of California on February 20, 1996 alleging that respondent has discriminated against him on the basis of his age.
On an order filed on December 11, 1996, the Court found that petitioner had met his initial burden of establishing a triable issue of fact. The court decided that petitioner has made out a prima facie case of age discrimination. Appendix B pg. 7 line 18.
A conference before the trial was set for October 10, 1997 and the TRIAL BEFORE THE JURY was ordered to begin on October 20, 1997. On October 9, 1997 respondent's motion for SUMMARY JUDGEMENT was GRANTED by the district court, just a day ahead of the PRE-TRIAL CONFERENCE OR EVIDENTIARY HEARING. Appendix C.
The district court did not give petitioner an opportunity to explain at the evidentiary hearing that additional

evidence was filed just prior to the conference before trial. This evidence was filed with the lower court and was disregarded without any explanation because of the premature granting of summary judgement.
The appeal followed because of an unjust and untimely summary judgement and the award of cost and fees to respondent entered against the petitioner.

Statement of the facts:

On or about April 2, 1993 petitioner received a letter from V. Marathe. Chief Elect. Eng. for the respondent.
The letter stated, in part:

> **"I regret to inform you that we have been unsuccessful in locating another position.."Exhibit G pg. 1.**

No other explanation was given as a reason to terminate the petitioner.

He was also notified that respondent was placing him in "Holding Status" effective April 1993 and stated that, if the company had not found an assignment for him by the end of the 3 months "Holding Status" period, he would be terminated.
"Holding Status", by respondent's own policies, is defined as:
No salary for petitioner for 3 months, except unemployment benefits of $121 per week; technically, he will be layed off.
"Employees can select" Health Insurance at a cost to them (which was provided free) would now cost the petitioner $265.00 per month. Accidental Life Insurance still will be provided free of charge.
Petitioner essentially claims that he was constructively discharged.

Because of respondent's actions against the petitioner and his economic condition he informed respondent, in his letter dated April 18, 1993 that he will retire effective April 23, 1993.
Appendix G pg. 2.
Petitioner understood that in order to obtain his funds from respondent's retirement savings plan, he would have to be separated from the company. Therefore, petitioner states he was "forced to retire". Presently, petitioner is not entitled to any benefits provided by respondent and has been unable to secure employment because of his service connected disability and not having a college degree.
Marathe's letter, dated April 20, 1993,

> **"When placing persons in holding status, it is the chief's responsibility to evaluate the existing performance/ranking system and place persons, as they are released from projects, according to performance rankings. Bechtel based its decision on an evaluation of your performance and ranking".** Appendix G pg. 3 and 4.

Marathe's letter, dated April 20, 1993 was received by petitioner at his home, prior to his departure to Oregon on April 29, 1993 and after he left respondent's property.
Marathe states in the letter that he based his decision, to terminate petitioner, on downsizing and his performance /ranking.

<u>Petitioner can testify that up to the time he left respondent's employment, respondent never mentioned to petitioner that there was a downsizing in progress or that the reason he was placed on "Holding Status-layoff" was because of his performance.</u>

Petitioner requested from the Equal Employment Opportunity Commission (EEOC) the file that was pertinent to his case and one of the included documents were the following:

A letter from Dianne M. Adams (Employee of respondent) to the Equal Employment Opportunity Commission, dated May 31, 1994.

> **"It was clearly explained to Mr.Ascarrunz that, according to Bechtel policy, the decision to place him on holding status was due to lack of available work. Workforce ranking is a key element in determining individuals to be laid off. The year of his retirement, Mr.Ascarrunz was ranked at the bottom of his peer group..... The decision to place him on holding status was based on his position in ranking and the availability of work".**
> Appendix G pg. 5 and 6.

Petitioner was never clearly or otherwise explained anything about his performance while he was an employee of the respondent.

In this letter she is trying to state this fact, but it is not true. In fact, she implied to the EEOC that petitioner was separated from his employment for "Good Cause" and was selected for termination because he was one of the poorest performers in the company. This is not true, under any circumstances.

Adams never mentioned the existence of this letter in her affidavit to the District Court.

The electrical forced ranking report, dated November 1992, which was included in the letter from Dianne M. Adams to the Equal Employment Opportunity Commission. dated May 31, 1994. Shows the following:

Petitioner is the only one shown in rank 4 after 26 years of service. The last on the list.
The 30 employees are segregated by race as follows:
2 employees are hispanic (Petitioner is segregated here) and
28 employees are whites. The 2 employees segregated as hispanics are also segregated by a special employee No. starting with a letter. All 30 employees are also segregated by age with the youngest, age 39, in the first rank. The fact is, with less years of engineering experience than older employees.

Marathe and Adams failed to mention in their statements that petitioner was ever advised of a "Company Downsizing" or of a "Poor Performance-based Layoff" during the time of his employment.

Respondent failed also to advise petitioner of poor performance prior to his termination of Policy 1101: states:

> "Unsatisfactory Performance: Employees who fail to perform their jobs in a satisfactory manner may be terminated, provided the employee have been advised of the specific shortcomings and given an opportunity to improve their performance".

The layoff for the petitioner "Breached an Employer Commitment" because it violated respondent's own layoff policy in reference to notifying their employees of their poor performance prior to taken any action.

There is no evidence that petitioner was advised of poor performance while he was an employee of the respondent.
Respondent has presented no evidence that petitioner was incapable of performing tasks for which he would be responsible, on the contrary: Petitioner can prove that he was an excellent employee. Appendix G pg.7.
Respondent has produced documents that petitioner was ranked the poorest in performance in the company. These documents don't carry any signature of acknowledgement by the petitioner and he states that he never saw these documents in his entire life prior to his layoff; although respondent defines in his policy 1101 that any "poor performance" should be grounds of dismissal after advising an employee of this fact.
Marathe's and Adams statements are all conclusions and are not backed-up by documents showing how reduction of personnel for a "Company Downsizing" was accomplished or proofs/analysis of poor performance/ranking by petitioner. In summation, respondent has denied the existence of documental evidence on how the reduction of personnel was accomplished.

The lower court has ruled out that:
"He (petitioner) submitted performance evaluations for himself that were positive". Appendix B pg. 7, line 1.

In reference to respondent's Personnel Policy 203 third paragraph:
"With advance notice of at least

> one week, salaried employees who work a regular schedule may be placed on a reduced schedule at management's initiation when there is a temporary slowdown in available work of at least one month.."

Petitioner was never offered a reduced schedule in lieu of layoff.

Petitioner places great emphasis on the fact that his discharge came without warning. Respondent fails to proof the assertion of poor performance/ranking notification to the petitioner prior to his layoff. Petitioner worked for the respondent for 26 years, giving the respondent a dedicated and meritorious service and for that reason he received many awards, among them a Rolex gold watch just prior to his termination.
Written evidence shows that respondent made only one statement regarding separation of employment for petitioner: "Separation from his employment was because of lack of work, nothing else". No other excuse was made prior to petitioner's departure from respondent's property.

Undisputed Legal Issues

A member of the protected class (age 40 to 70)
Performing his job in a satisfactory manner

The Court Order filed December 11, 1996 states:

> Id at 891. "Respondent contests neither that petitioner is a member of the protected class nor

that he was performing his job in a unsatisfactory manner.....". Appendix B pg. 4 line 13.

Disputed Legal Issues

1. Discharged
2. Either
   a. replaced by a substantially younger employee with equal or inferior qualification; or
   b. was discharged as a part of a reduction of the work force, and that the discharge occurred under circumstances giving rise to an inference of age discrimination.

On an order filed on December 11, 1996, the court decided that petitioner has made out a prima facie case of age discrimination. The court has ruled that the Petitioner has provided sufficient evidence to create an issue of fact that he was "constructively discharged and replaced by a younger employee".

"In addition the court established that respondent must come forward with a legitimate reason for discharging the employee and petitioner must show that the reason for discharge was a pretext for discriminatory conduct". Appendix B. Respondent has preferred legitimate, non-discriminatory reasons for petitioner's termination. Downsizing or Reduction in Force (RIF) is the reason for petitioner's termination.

Respondent's proffered reasons for downsizing are simply pretexts for discrimination against older employees.

Petitioner was Constructively Discharged

Respondent was planning to downsize: therefore, the "Holding Status" v. "Layoff" was only a pretext. The "Holding Status Notice" in lieu of a layoff is considered as an "exit incentive" and is considered by the Law as a "Constructive Discharge".

The lower court has ruled out that:

> "Given the dramatic reduction in the Gaithersburg office, it seems unlikely that many workers were recalled once they were put in "holding status". Petitioner's argument can be construed, therefore, as a claim that his retirement was forced by the company." Appendix B. pg. 5 lines 8-13.
>
> ...this court is unwilling to say that a reasonable jury could not find such action to constitute constructive discharge. Appendix B. pg. 5 line 25

Petitioner was replaced by a substantially younger employee with equal or inferior qualifications.

Petitioner states that the respondent's articulation of a legitimate non-discriminatory reason for the decision to terminate the petitioner's employment is nothing but a pretext. It is based on the declaration of three of respondent's employees, which are misrepresenting the truth as to the facts leading to the termination of the petitioner.

Marathe's declaration to the Court dated July 24, 1996.

> "My decision to place Ascarrunz

on holding staff was based solely on the unavailability of a new assignment for him. Although ranking of employees often plays a role in certain assignment decisions, in Ascarrunz's case, it did not. Appendix G. pg 11

Marathe's letters, dated April 2nd and 20th of 1993 and the above declaration to the Court do not match in content. Therefore, he has made a false testimony and is misleading the actual facts by changing his prior statements.

Continuing his declaration Appendix G pg.10

6."The lead physical designer on the Hartwell project was Kenneth Shaffer, a highly ranked designer with critical computer skills and recent experience with the design of fossil fuel plants such as Hartwell. Ascarrunz lacked both significant computer drafting skills and recent experience with the design of fossil fuel plants.

Upon return to the respondent's Maryland office in October of 1992, petitioner was instructed to report to V. Marathe, recently promoted to Chief Electrical Engineer on September 1992. Petitioner never met, knew or heard about this individual.
Marathe is not telling the truth in his statement to the Court, he is misleading the Court with a negative portrayal of the petitioner a designer Grade 26 for many years.
In January of 1993 Shaffer was a designer Grade 23. A "highly ranked designer" does not fit the job description for a designer Grade 23.

In reference to respondent's Job Description - Salary Grade 22,23 under Job Dimensions.

> **Supervision Exercised - None. May direct the work of drafters and less experienced designers when assigned.**

Marathe, in assigning a Grade 26 to work under the supervision of a Grade 23 is not following respondent's owns policy. A designer 23 is no more than a Computer Aided Drafting Designer "CADD" operator. Shaffer, at no time, was a lead designer in a plant like Hartwell (as is noted in reference to Respondent's Responses to First Set of Interrogatories).
Petitioner took a course in CADD, obtaining a certified document of completion, signed by Marathe.
Contrary to Marathe's statement that petitioner lacked "recent" experience in plants such as Hartwell. Petitioner did have experience of the same type of plant within the previous 4 years.
Petitioner was in a supervising designer Grade 26 position many years before August of 1992.
Marathe could and should have assigned petitioner to the Hartwell project as a lead design supervisor since the Hartwell project just started in August of 1992 and without a design supervisor.
Therefore, respondent demoted the petitioner with the excuse of lack of work.

Shaffer's Declaration to the Court.

> **"As a lead physical designer I oversaw all the physical related electrical design of the project ...As such, Ascarrunz took technical, day to day direction**

and work assignments from me..Accordingly I was required to do "CADD" work for him.. At no time did I take directions from Mr.Ascarrunz".

Shaffer's statements only create an issue of fact and is misleading the Court. He never oversaw or gave directions to petitioner. Shaffer used the written materials of the petitioner as a "CADD" operator.
While petitioner was performing his duties to complete the design, he was requested to vacate two offices before even his time of "Holding Status" was over and somebody else continued his duties. Petitioner was clearly requested to vacate the premises of the respondent because the people in charge of the job were afraid petitioner will delete all the job files from tne computers.

Petitioner is discharged as a part of a reduction of the work force, and the discharge occurred under circumstances giving rise to an inference of age discrimination.

Respondent refused to hand out any documents concerning downsizing.
Respondent's position changed just prior to the pretrial conference. Petitioner was served with several exhibit documents on October 7, 1997 some of which were the "Gaithersburg Regional Office ("GARO") Engineering Employee Count" from 12/21/92 to the end of June 1996.
Utilizing the above data petitioner was able to develop Table I.

TABLE I

	A								B				
									OVER 40 →				
1. SALARY GRADE	E	F	G	H	21	22	23	24	25	26	27	28	29
2. No. OF EMPLOYEES	3	1	1	9	16*	54*	73*	62*	95**	111**	37**	1*	1
3. No. OF LAY-OFFS	2	1	1	7	8	24	27	18	25	30	5	1	
4. No. OF EMPLOYEES	1	2	-	2	8	30	46	44	70	81	31	-	1
5. No. OF LAY-OFFS	-	-	-	-	3	16	19	14	23	26	4	-	-
6. No. OF EMPLOYEES	-	-	-	2	5	14	27	30	47	55	27	-	-
7. No. OF LAY-OFFS	-	-	-	1	1	5	8	11	15	6	2	-	-
8. No. OF EMPLOYEES	-	-	-	1	4	9	19	19	32	49	25	-	1
9. No. OF LAY-OFFS	-	-	-	-	1	4	5	1	5	12	1	-	-
10 No. OF EMPLOYEES	-	-	-	-	3	5	14*	18*	27*	37*	24*	2*	1

In reference to "Table I, line 2" employees marked with one asterisk were promoted within 3 years and occupied the positions on "line 10" marked with one *. Employees over 40 in "line 2" marked with two ** have been displaced from their jobs; with the exemption of employees under 40 that just have been promoted to Grades 25, 26 and 27. Respondent has been able to circumvent the law by discriminating older employees.

"Lines 1 through 10" is data obtained from the "Gaithersburg Regional Office ("GARO") Engineering Employee Count" from 12/21/92 to the end of June 1996.

"Line 1" indicates job classifications in accordance with respondent's classification of salary grades.

In order to make the table condensed, the totals for lines 2 through 10 were combined by salary grade.

By observation, "line 10, side-A" has less employees under 40 years of age and "line 10, side-B" has more employees over the age of 40. The line-up of employees in reference to "line 10" suggests that the respondent has apparently fashioned a compliance with the rules of the ADEA.

Because we live in a real world, downsizing is not like cutting a wedding cake. In the respondent's pre-planned downsizing nobody gets promoted, nobody gets hired. Every time the respondent wanted to dismiss employees over the age of 40, these employees were provided with a letter, reasoning their "Holding Status" with "lack of work". The "lack of work" statement made by the respondent was used to terminate the petitioner and is a pretext. In reality there was work for the same skills as those of the petitioner, as shown in "Table I line 10" for Grade 26 and 27.

Respondent alleges that downsizing was due

to economic changes. Petitioner affirms that the downsizing was a money issue. Respondent never explained to petitioner his rights under Erisa which prohibits employers to deprive benefits to employees. Respondent never obtained an "ADEA" release from petitioner as well as he was never given statistics on the impact of older workers and minorities because of an "RIF" in accordance with the Older Workers Benefits Protection Act "OWBPA". Petitioner was categorized by respondent as one of two hispanic out of 28 whites in a group of 30. The Worker Adjustment and Retraining Act "WARN Act" 20 C.F.R. 639.3 (a)(1) requires that in a "Downsizing" or "RIF" situation the employees be given a 60 days advance notice. No such notice was given to petitioner; his discharge came without warning.

Respondent has not provided any concrete evidence to the court for downsizing or the manner in which the downsizing was accomplished. Respondent must produce a corporate plan for downsizing that was equitable for all employees regardless of their age. Respondent kept the master plan for downsizing confidential. Downsizing was never announced, advertised, described or even mentioned. The downsizing did not occur in a short time but in a span over at least 4 years. Respondent fails to comply with the "Warn Act" 20 CRF 639.

IT IS CLEAR AND EVIDENT THAT PETITIONER'S EMPLOYMENT RECORD IS COMMENDABLE UP TO HIS SEPARATION FROM EMPLOYMENT AND HIS TERMINATION CAME WITHOUT WARNING IN VIOLATION OF RESPONDENT'S OWN POLICIES AND FEDERAL RULES. THE BASIS FOR HIS TERMINATION WERE PRETEXTUAL AND THE POLICIES, REGULATION LAWS AT ISSUE WERE INCONSISTENTLY APPLIED, IN SOME INSTANCES NOT ENFORCED AT ALL.

ARGUMENT

WHETHER GOOD CAUSE EXISTS TO CONSIDER OTHERWISE UNTIMELY NOTICE OF APPEAL AND TO EXAMINE PREVAILING DELAY TO SEE IF THERE IS SOMETHING AKIN TO "EXCUSABLE NEGLECT" OR "GOOD CAUSE" THAT EXCUSES DELAY.

Judgment, holding party liable for fees or costs but deferring decision on amount of award, is not final. Carter v. General Motors Corporation 983 F.2d 40 (5th Cir. 1993).

Petitioner states that his Notice of Appeal was timely because the District Court's imposing costs did not become final within the meaning of 28 U.S.S. § 1291 until clerk of the District Court approved amount of those costs on November 7, 1997 Appendix F, and time for appeal begun to run on that date. Setting the deadline for the Notice of Appeal to December 7, 1997 and consequently the Notice of Appeal received by the District Court on November 17 and filed on November 18, 1997, was on time. F.R. A.P. Rule 4(a)(1), 28 U.S.C.A.

In the case Wright v. Deyton 757 F.2d 1253 (1985) The United States District Court for the Northern District of Georgia, Orinda D. Evans granted appellant's untimely motion to extend time to file notice of appeal, finding good cause for filing delay, and appeal was taken to the United States Court of Appeals Eleventh Circuit.

Petitioner Miguel A. Ascarrunz is a similar case on a dismissal of his appeal by the Ninth District. Court ORDER filed December 18, 1997 on the grounds of "lack of jurisdiction", specifically for the reason that Notice of Appeal was not filed within 30

days from date of entry on Oct. 15, 1997. Petitioner asks the Supreme Court for reconsideration of such an ORDER because of the following:

1. In the Court ORDER filed December 18, 1997 the date of entry for the judgement is NOT October 9, 1997.
2. Court Deputy Clerk advice petitioner that the beginning of 30 day count was October 15, 1997.
3. The correct date of entry for the judgement was October 15, 1997, Court Record No. 57.
4. Appeal filing date deadline was November 14, 1997, Court Record No. 57.
5. November 14, 1997 was a Friday, therefore, the filing it is in accordance with FRAP 26(a) of the Ninth Circuit:

COMPUTATION OF TIME

".....The last day of the period so computed shall be included, unless it is a Saturday, Sunday ..... , or when 'the act to be done is the filing of a paper in court,..... in which event the period runs until the end of the next day which is not one of the above aforementioned days".

The Notice of Appeal by the petitioner was received by the district court on time on Monday, November 17, 1997. (Entry date was November 18,1997 Court Record No.63), Petitioner can certify that the Notice of Appeal was serviced on November 10, 1997 by means of the U.S.Postal Certified mail service, 5 days ahead of the November 14, 1997 deadline. Appendix E.

The date on which a Notice of Appeal is mailed can be considered whether there was excusable neglect. The petitioner has done

all that can be reasonable expected. The Supreme Court's decision in Fallen as an illustration, advises that the rules should be interpret "with literal compliance in cases in which it cannot fairly be exacted"

In the petitioner's case, the Notice of Appeal cannot be verified if it was or was not delivered Friday, November 14 1997, before midnight on the dateline of Friday November 14, 1997 and then it was receipted by the clerk of the court on Monday November 17, 1997 @ 8:00 A.M. This can be construed that the Notice of Appeal was on time without trying to verify step by step the route of the mail in 8 days from Dallas, Oregon to San Francisco California. Aldabe v. Aldabe 616 F.2d 1089 (Ninth Circuit 1980).

The application of the Supreme Court in Fallen is consistent with those cases holding, that, when a petitioner mails his Notice of Appeal to the district court and it is received before the filing deadline but not filed until the deadline expires, the notice is timely even though filing and not receipt is required under the literal terms of Fed. R. App.P 4. Stevens v. Heard, 674 F.2d 320 (5th Cir. 1982).

WHETHER PETITIONER'S RIGHTS WERE VIOLATED WHEN EVIDENCE PRESENTED TO THE DISTRICT COURT WAS DISREGARDED WHEN RESPONDENT'S MOTION FOR SUMMARY JUDGEMENT WAS GRANTED JUST A DAY AHEAD OF THE PRE-TRIAL CONFERENCE OR EVIDENTIARY HEARING.

The lower court has determined that petitioner has established a prima facie case of age discrimination in employment. The Ninth Circuit requires that the petitioner, in order to prevail, must demonstrate that the alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory. The burden of production shifted to the respondent to produce evidence that such actions were based on legitimate business reasons. Respondent did not produce any evidence but argues that petitioner was laid off because of downsizing and that petitioner can not show that the respondent's preferred reasons are simple pretexts for discrimination. However The "ADEA" states: "Satisfactory explanation by respondent for terminating petitioner does not require petitioner to come forward with additional evidence, attacking explanation; it merely destroys mandatory inference of discrimination and joins issues for resolutions on all evidence by trier of fact (ADEA)".

Petitioner has incorporated the analysis set-forth in his argument on the issue to establish that he has presented sufficient evidence of pretext to survive summary judgment.

The termination came after 26 years of excellent service for the respondent. The lower court states: "The evidence supplied by respondent demonstrates that it continues to employ electrical designers of petitioner's grade. Based on this it may be

inferred that it has a continuing need for those skills and services".
The respondent has hired personnel in the same grade as that of the petitioner but, because of retaliation against petitioner, the respondent refused to acknowledge petitioner's application for these openings.
The "Holding Status Notice" in lieu of a layoff can be considered as an exit incentive and is considered by the Law as a "Constructive discharge".
Petitioner was not directly discharged but he claims that he was constructively discharged when respondent made conditions of employment intolerable as to effectively forcing the petitioner to resign after receiving his notice of discharge.
Petitioner has provided evidence of a constructive discharge
in the actions of the respondent who, instead of giving him a lay-off, was given a holding status in order to force petitioner into an involuntary retirement.
Petitioner was also discriminated against in salary increases with the excuse of position in ranking. Petitioner was effectively discharged from his duties when he was ask to vacate two offices.
Petitioner concluded that he was forced out and decided to retire.
The concept of "constructive discharge" may be invoked under the ADEA. A constructive discharge occurs when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. Cockrell v. Boise Cascade Corp., 781 F.2d 173 (10th Cir. 1986) holds that an employee must show that the employer makes work conditions intolerable, rather than making conditions merely "awkward" to establish a

constructive discharge claim.
Respondent took the petitioner's medical condition as a factor for his discharge. Petitioner was not assigned to the Hartwell project as a design supervisor Grade 26, instead he was demoted as to work for a Grade 23 designer. All of this is evidence that respondent treated the petitioner different and discharged him from his duties. This shows that petitioner was replaced.
Respondent states, on different occasions that while petitioner was an employee the decision to give the petitioner a layoff is based solely on "LACK OF WORK"; then later on, after petitioner left his place of employment, it is "DOWNSIZING" & "PERFORMANCE". The EEOC was made to believe it is "LACK OF WORK" AND "FORCED RANKING" and THAT THE TERMINATION OF PETITIONER IS FOR A "GOOD CAUSE".
As time goes by, respondent affirms is not "PERFORMANCE" nor "FORCE RANKING" but "COMPUTER EXPERIENCE" in affidavits to the Court requesting summary judgement.
Finally, on a second try to the Court for summary judgement, respondent affirms the termination of petitioner as "DOWNSIZING". All of these changing reasons are evidence of pretext. Where different ultimate inferences can be drawn, Summary Judgement is inappropriate. Sankovich v. Ins. Co. of North America, 638 F.2d 136,140 (9th Cir. 1981).
IT IS CLEAR AND EVIDENT THAT PETITIONER WAS CONSTRUCTIVELY DISCHARGED AND RESIGNED UNDER DURESS.
Petitioner has presented evidence just prior to the Pre-trial conference or Evidentiary Hearing that, up to the time he left respondent's place of employment, he was never explained anything about downsizing or his poor performance and he

places great emphasis on the fact that his discharge came without warning. Respondent fails to proof the assertion of notification to petitioner, in accordance with the WARN Act 20 C.F.R. 639, concerning the alleged downsizing and poor performance notification prior to his layoff.

The respondent's legitimate non-discriminatory reasons for his actions must exist at the time the respondent made his decision. The ADEA provides that it shall not be unlawful for an employer to discharge an individual for good cause. Poor performance on the job has regularly being held to constitute sufficient "good cause" to terminate employees within the protected age group specifically in downsizing. If the employee is discharged for violation of a work rule, the employee must prove either:

That he did not violate the rule or that others, who did violate it, were not treated in the same manner. However, if the evidence of the employee's wrongdoing is not discovered by the employer until after the employer has dismissed the employee in violation of the ADEA, the employee will not be barred from relief under the Act. McKennon v. Nashville Banner Publishing Co. 115 S.Ct. 879 (1995).

The layoff for the petitioner violated respondent's own layoff policy in reference to notifying their employees of their poor performance prior to taken any action.

The impeachment of respondent's testimony regarding how petitioner's performance-ranking was depicted to the EEOC and later to the Court establishes questions of pretext. The documents in existence provide direct evidence of discriminatory intent against older workers.

In most cases the "layoff" came under a pretext, following respondent's policy of

"Holding Status", hoping the displaced employee will voluntarily quit; get another job or retire.

The lower court has stated: "Petitioner asserts that his own low performance rating can only be explained by virtue of age discrimination because he received consistently positive performance reviews and held positions of significant responsibility".

On October 7, 1997 respondent filed motions in limine to exclude evidence regarding termination for unsatisfactory work performance and testimony by petitioner of his job skills. The opposition to the above motions was filed on October 11, 1997. Court Record No. 58 and 59. Petitioner's performance-ranking was depicted in fact to the EEOC that petitioner was separated from his employment for "Good Cause" and was selected for termination because he was one of the poorest performers in the company. There is evidence this is not true, under any circumstances and this is why respondent filed the motion in limine. The evidence shows very clearly that there are triable issues of pretexts. Respondent has constantly switched his reasons for petitioner's "Holding Status-Layoff notice", creating an issue of fact.

The Ninth Circuit has also held that little evidence is required to be produced by petitioner in order to meet his burden of establishing the fact that the Respondents' reasons for the employment action were a mere pretext.

Although the mere existence of a prima facie case is insufficient to preclude summary judgment, a petitioner "need produce very little evidence of discriminatory motive to raise a genuine issue of fact' as to pretext." Warren, 58 F.3d at 443 [quoting Lindahl v. Air France,

930 F.2d 1434, 1437 (9th Cir. 1991)]. "To survive an employer's summary judgment motion, only a genuine factual issue with regard to discriminatory intent need be shown, a requirement that is almost always satisfied when the petitioner's evidence, 'direct or circumstantial, consists of more than the [presumption established by the three-pronged prima facie case test]'". The same evidence can be used to establish a prima facie case and to create a genuine issue regarding whether the employer's explanations are pretextual. Wallis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994).

In Wallis v. J.R. Simplot Co., 26 F.3d 885 (9th Cir. 1994) the Court held when, however, a Petitioner introduces additional evidence which consists of more than the prima facie presumption, a factual question will almost always exist with respect to any claim of non-discriminatory reason, additional evidence to be presented may be either direct, circumstantial or statistical.

The lower court has denied petitioner of his rights to have access to the evidence of discriminatory pretext via a 56 (f) Affidavit. The Court ignored petitioner's 56(f) affidavit Item 5 requesting documents evidentiary of respondent's actions. The request specifically asks for the following:

> "Provide all documents discussing or referring to any decline in available work for electrical engineers and designers in 1992 and 1993, a reduction in work load in 1993 and all documents discussing or referring to any employee-downsizing for 1992 through 1996".

THE COURT ASSUMED THAT ADDITIONAL DISCOVERY REQUESTED BY PETITIONER, WHO FILED A FRCP 56(f) AFFIDAVIT WILL NOT PRODUCE THE NECESSARY EVIDENCE TO PROVE THAT RESPONDENT'S EXPLANATION OF "DOWNSIZING" WAS A PRETEXT FOR DISCRIMINATION.
Petitioner needs only to demonstrate that neutral employment practices operate to exclude from a job a disproportionate number of persons protected by the "ADEA".

If there is general reduction in a work force, age-discriminated petitioner need not necessarily show that he was directly replaced by a younger employee; but once the petitioner has presented a prima facie case of age discrimination, the burden of production shifts to the respondent to show that the challenged practice was based upon legitimate business reasons.
In order to meet its burden, respondent must validate the selection device utilized to show that it has a manifest relationship to the employment question. Griggs v. Duke Power Co., 401 US, 424, 91S. Ct. 849. In Wards Cove Packing Co., v. Atonio, 490 U.S. 642, 109 S. Ct. 2155 (1989), the Supreme Court stated that in a disparate impact case:

> "...the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer... A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced to the use of spurious, seemingly neutral employment practices."

Additionally, petitioner may prove pretext

by showing direct evidence of discriminatory intent, even though such is not a requirement in a disparate impact approach. Watson v. Fort Worth Bank & Trust, 108 S.Ct. 2784.

To establish a prima facie case of age discrimination under ... theory, petitioner need not to show that respondent was motivated by discriminatory intent, but rather, petitioner needs only to demonstrate that .. neutral employment practice operate to exclude from a job a disproportionate number of persons protected by the ADEA Age Discrimination in employment act of 1967 4(a)(1)12(a),29 U.S.C.A. $ 623(a)(1), 631(a).

Respondent fails to produce a refutable evidence of downsizing or reduction of work in accordance of respondent's own policies and federal rules, resulting in an issue inferred of pretext.

Petitioner was not given "lay-off" because of:

Lack of work, un-satisfactory performance, lack of skill to operate a computer or any other pretext, including downsizing, but on the account of his age.

It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.

It is the very essence of age discrimination to fire an older employee and hire or retain a younger one in order to save money. Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987), holds that the ADEA prohibits an employer from discharging an older, higher-paid employee in order to hire a younger, lower- paid employee for the purpose of saving money. The Ninth Circuit has held that a petitioner need produce very little

evidence of discriminatory motive to raise a genuine issue of fact as to pretext. Strother v. S. Cal. Permanent Medical Group, supra, p. 870; Warren v. City of Carlsbad, supra, p.443; Linthal v. Air France, supra, p. 1437.

The ultimate question which can only be resolved through a " 'searching inquiry' - one that is most appropriately conducted by the fact finder, upon a full record." Lam v. University of Hawaii, supra, p. 1564; Sischo-Nownejad v. Merced Community College Dist., supra, p. 1111. Additionally, "any indication of discriminatory motive ... may suffice to raise a question that can only be resolved by a fact finder." Schnidrig v. Columbia Machine, Inc. supra, p. 1409.

(1) Identify the challenged employment practice;
(2) Show that the challenged practice has a disparate impact on older persons; and
(3) Show that the challenged practice caused exclusion of older persons because of their age.

Watson v. Fort Worth Bank and Trust,487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988).

A prima facie case of age discrimination may be made through the submission of statistical evidence which shows that a facially neutral employment policy has a disparate impact on older employees or applicants. Rose v. Wells Fargo & Co., 902 F.2d 1417 (9th Cir. 1990).

Respondent has not submitted evidence which would support a finding that petitioner brought his claim in bad faith. Therefore, respondent's request to the lower court for award of costs and fees should have been denied.

WHETHER RESPONDENT'S FAILURE TO GIVE NOTICE OF DOWNSIZING OR REDUCTION IN PERSONNEL TO EMPLOYEES IN ACCORDANCE TO THE "WORKER ADJUSTMENT AND RETRAINING NOTIFICATION OR THE "WARN ACT" 20 C.F.R 639 WAS LEGAL. AUTHORITY: 29 U.S.C. 2107(A). SOURCE: 54 FR 16064, APR. 20, 1989,

"I regret to inform you that we have been unsuccessful in locating another position....No other explanation was given as a reason to terminate the petitioner. Petitioner places great emphasis on the fact that his discharge came without warning. Respondent fails to proof the assertion of poor performance notification to the petitioner prior to his layoff. Petitioner has established a prima facie case of age discrimination in employment and respondent has preferred as "DOWNSIZING" or "REDUCTION IN FORCE" (RIF) as the reason for petitioner's termination. The evidence shows that respondent has a continuing need of skills and services as provided by petitioner.

The Worker Adjustment and Retraining Act "WARN Act" 20 C.F.R. 639.3 (a)(1) requires that in a Downsizing or "RIF" situation the employees be given a 60 days advance notice. No such notice was given to petitioner, his discharge came without warning.

Downsizing or Reduction in Force (RIF) is the reason for petitioner's termination. Respondent has not provided documents discussing or referring to any employee-downsizing for 1992 through 1996". Respondent has not produced any evidence as to the criteria used as to how the reduction in personnel was to be carried out. How rapid must implementation be and a study approach to mandates prohibited by the law: The WARN Act.

The trier of fact can determine whether the

long period of time taken for downsizing allowed the respondent to evade the "WARN Act" 29 U.S.C. 2102(d), 20 C.F.R 639.5(a) and circumvent The Age Discrimination In Employment Act ("ADEA") 29 U.S.C. 621, et seq.."ADEA" by allowing employees under 40 years of age to occupy positions of the older workers on time.
RESPONDENT'S FAILURE TO GIVE NOTICE OF "DOWNSIZING" TO EMPLOYEES IN ACCORDANCE TO THE "WARN Act" 20 C.F.R 639. MAKES RESPONDENT LIABLE TO DAMAGES AND CIVIL PENALTIES BECAUSE OF A VIOLATION OF THE ACT. IF THERE WAS NO DOWNSIZING AS DICTATED BY LAW THE PREFERRED REASON FOR RESPONDENT TO TERMINATE PETITIONER IS NOTHING BUT A PRETEXT FOR DISCRIMINATION. THEREFORE RESPONDENT HAS NOT MET ITS BURDEN OF PRODUCTION TO ESTABLISH THE JOB-RELATEDNESS OF ITS SELECTION PROCESS AND HAS INTENTIONALLY DISCRIMINATED AGAINST THE PETITIONER BECAUSE OF HIS AGE.

Based upon the existing evidence and knowing that those issues, on which petitioner would have the burden at trial, there are clearly genuine issues of material fact to be resolved.

Petitioner respectfully prays that a writ of certiorari is issue to review the judgment below.

Respectfully submitted

Date February 29, 1998.
Resubmitted June 14, 1998

Miguel A. Ascarrunz